84-34

NO. _____

THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

SHARON M. BARGER, MARGARET DIANE BRANDES, and VALERIE MARIA GILBERT,

Petitioners,

v.

PLAYBOY ENTERPRISES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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127 pp

QUESTION PRESENTED

Whether the "Group Libel Rule" denied Petitioners their constitutional rights by arbitrarily denying them the right to recover damages for libel per se, solely because Petitioners were members of a "large" group including more than 25 persons.

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TABLE OF AUTHORITIES

Petitioners SHARON BARGER, MARGARET DIANE BRANDIS, and VALERIE GILBERT (hereafter "Petitioners" or "Plaintiffs" as appropriate) respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 5, 1983.

I

OPINIONS BELOW

The memorandum order and opinion of the District Court (per Marilyn Hall Patel, District Court Judge) was published at 564 F.Supp. 1151, and is attached as Appendix "A". The unsigned memorandum opinion of the Ninth Circuit Court of Appeals is unpublished, and is reproduced in Appendix "B".

II

JURISDICTION

This matter was initially filed in the Federal District Court for the Northern District of California on the basis of diver-

sity jurisdiction. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 21, 1984, and the instant petition was lodged with this Court within ninety days of that date. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

III

COMMON LAW AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the common law "Group Libel Rule" set forth in the fourth paragraph of the District Court's opinion (see Appendix A, p. 1153), and discussed at length, infra. It also involves the constitutional provisions of the First Amendment to the United States Constitution -- which safeguards Freedom of the Press; and the Ninth and Tenth Amendments, by which the several states are required to protect the competing constitutional interests involved in the protection of the individual's reputation. Furthermore, to some extent the instant case involves

application of the Fourteenth Amendment of the United States Constitution as well. (See fn. 4, post.)

The various provisions indicated above are reproduced in Appendix "C" hereto.

IV

STATEMENT OF THE CASE

A. Preliminary Proceedings.

This is an action for libel brought by three "public-figure" [1/] Petitioners following Respondent Playboy's publication in its July 1981 issue of an article entitled "Undercover Angel", and described in the front pages of the magazine as a "true story". It was written by an otherwise unidentified writer named Lawrence Linderman, and it identified a former police officer named "Dan Black" who had, according to the article, used his position as an undercover narcotics officer to obtain a large quantity of methamphetamine

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1. Plaintiffs admitted that, for the purposes of this lawsuit, they are "public figures".

and who then became such a heavy user of "speed" that he became a mentally unstable, compulsively violent criminal, whose history had included drug addiction, alcoholism, and bank robbery.

In the course of "Undercover Angel", the article claims that Black was the "first narcotics officer ever to infiltrate the Hell's Angels by 'riding' with the group's Richmond, Oakland and Vallejo chapters." As such, Black becomes a self-proclaimed eyewitness to the "life-style" of the Hell's Angels. In this capacity, he recounts the graphic details of a "Hell's Angels wedding party" which supposedly took place in Northern California. According to Black, "a minister (or someone dressed like one) married the bride and groom" sometime after midnight. Black falls asleep, but later awakens to see his friend Harris "fucking the bride".

The article continues: "The rest of the bikers were waiting their turn <u>to do the</u>

same, for an Angel's bride was turned out the morning after her wedding night." Later, Black is said to observe "the bride sucking off a biker who was doing her with a Coke bottle. He was followed by a man with a broom." Referring to the activities described in the previous sentence, Black's description of the Hell's Angels wedding is concluded with the general statement: "If an Angel's momma didn't acquiesce to all that, the old man would beat her up badly." (Quoted passages above are taken from "Undercover Angel", which was attached as an exhibit to the record below [emphasis added].)

On May 12, 1982, plaintiffs filed a one-count Verified Complaint for libel against Playboy, the publisher of "Undercover Angel", and incorporated the article by reference. The Complaint alleged that the article defamed certain wives of members of the Hell's Angels Motorcycle Club--including the plaintiffs--by its portrayal of the perverse,

degrading, and unnatural activities that the petitioners were supposedly required to perform the morning after their wedding night, under penalty of being severely beaten.

Plaintiffs alleged that the statements above-described were "of and concerning them", and further alleged that, because of their scatalogical nature, the statements were libelous per se.

Petitioners alleged that, although not personally named in "Undercover Angel", they were nevertheless defamed by the publication because petitioners were all "Hell's Angels wives", and were therefore ascertainable members of the group of persons described in the defamatory publication. On this basis, petitioners pleaded that the libelous allegations in "Undercover Angel" were "of and concerning them".

Playboy moved to dismiss the complaint and for summary judgment, alleging inter alia that plaintiffs had failed to successfully

plead that the defamation was "of and concerning them" as required by common law libel. Petitioners opposed the motion and also tendered declarations tending to show that geographical and factual similarities between petitioners and the persons and places mentioned in "Undercover Angel"[2/] served to identify petitioners as "ascertainable persons", thereby satisfying the of-and-concerning requirement of common law libel.

On December 21, 1982, an initial hearing on Playboy's motions was held. The district judge found that the statements complained of by petitioners did constitute libel per se (transcript of hearing on 12/21/82, p. 24:7-10). However, the court further found that

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2. Plaintiffs introduced declarations establishing that all the plaintiffs lived in Northern California, in the vicinity where the "wedding party" described in "Undercover Angel" is said to have occurred; and that plaintiffs were each married to members of the Hell's Angels Motorcycle Club who were affiliated with the specific club chapters mentioned in the defamatory publication (i.e. Oakland, Richmond, and Vallejo.)

plaintiffs' complaint and the declarations offered in opposition to the defendant's motion had failed to satisfy the of-and-concerning requirement, and plaintiffs were ordered to amend. The court further ordered that "the allegations in the Complaint... be directed to the terms 'brides' and 'mommas'." In a written order issued subsequent to the hearing, the court further required that plaintiffs' amended complaint "must allege with specificity" the total number of "Hell's Angels wives", "Hell's Angels brides", and "mommas", and the applicable distinctions between these groups. (Court's Order of 12/10/82, §2, reproduced in Appendix "D".) All discovery was stayed by the District Court pending further proceedings. (Ibid.)

Petitioners filed a Second Amended Complaint on February 3, 1983. Responding to the court's order, plaintiffs defined "Hell's Angels wives" as all females married to mem-

bers of the Hell's Angels Motorcycle Club, and indicated that the size of this group nationwide included 100 to 125 persons. Plaintiffs further alleged that "mommas" were females having had an extramarital relationship with members of the Hell's Angels Motorcycle Club; and "Hell's Angels brides" were defined as those "Hell's Angels wives" whose marriage ceremonies had been attended by members of the Hell's Angels Motorcycle Club, and who thus would be more closely associated by readers with the specific activities described in Playboy's libelous publication. Plaintiffs' pleading went on to allege that they were not members of the group of "mommas", but that they were members of both the larger group of "Hell's Angels wives" (having approximately 100-125 members) and of the subgroup defined as "Hell's Angels brides" (having 15-20 members).

Playboy renewed its Motion to Dismiss and for Summary Judgment, again alleging,

inter alia, that the libel was not "of and concerning" petitioners. After hearing oral argument on the motions, the District Court in a written opinion dismissed plaintiffs' complaint without leave to amend for failure to successfully plead of-and-concerning, one of the necessary elements of plaintiffs' cause of action for libel.[3/]

B. District Court Opinion.

In a published memorandum order and opinion, the District Court dismissed petitioners' complaint with prejudice on the ground that petitioners had failed to successfully plead that the defamation was of-and-concerning them. (Dist. Ct. Opin., §I,

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3. The District Court also independently ruled that plaintiffs had failed to plead "actual malice" with sufficient specificity to satisfy the requirements of New York Times Co. and its progeny. (Dist.Ct. Opin., §II, pp. 1155-1157.) The parties fully briefed and argued the malice issue before the Ninth Circuit, but the Circuit Court did not reach that issue because of its ruling upholding the dismissal of the complaint on the of-and-concerning ground. Similarly, petitioners make no other mention of the malice issue in the instant petition.

pp. 1152-1155.)

In pertinent part, the District Court held:

> "Plaintiffs who sue for defamation must show that the allegedly libelous statements were made 'of and concerning' them, i.e. referred to them personally. When an article names specific individuals, this is easily done. However, when the statements concern groups, as here, plaintiffs face a more difficult and sometimes insurmountable task. If the group is small and its members easily ascertainable, plaintiffs may succeed. But where the group is large -- in general, any group numbering over 25 members -- the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning them'." (Dist.Ct. Opin., 564 F.Supp. 1151, 1153 [citations omitted][emphasis added].)

With the foregoing as its doctrinal framework, the lower court undertook its analysis of whether the libelous allegations in "Undercover Angel" "could reasonably refer to groups small enough to meet the 'of and concerning' requirement." (Dist.Ct. Opin., 564 F.Supp., at 1154.) Having rejected the

geographical and situational factors urged by the plaintiffs as potentially narrowing criteria in applying the test of whether the plaintiffs were ascertainable individuals within the libelled group (see, e.g., fn. 2, ante, and accompanying text), the court readily found that the number of members in the group of "Hell's Angels wives" to which the plaintiffs belonged was "well above the threshold for showing 'of and concerning'". (564 F.Supp. at 1154.) Accordingly, the geographical, factual, and situational similarities between the plaintiffs and the actual persons, places, and events described in "Undercover Angel" were not accepted by the court as factors potentially narrowing the larger group to ascertainable persons, and plaintiffs' complaint was dismissed with prejudice for failure to state a claim that the libel was of-and-concerning them.

C. Opinion of the Ninth Circuit Court of Appeals.

In a brief, unsigned memorandum opinion,

the Ninth Circuit affirmed the District Court's dismissal of plaintiffs' complaint for failure to successfully plead of-and-concerning. Adopting the views of the district judge, the Ninth Circuit found that the group of "Hell's Angels wives" was necessarily "a group too large to permit recovery under California law." (9th Cir. Opin., referring to the opinion by the District Court.) Having thus determined that the larger group to which plaintiffs belonged was necessarily too large to permit recovery, the court was similarly unwilling to recognize the criteria offered by plaintiffs as narrowing the larger group to "ascertainable persons", as required by the common law of libel. Accordingly, the Ninth Circuit affirmed the District Court's dismissal of petitioners' complaint for failure to allege that the defamatory statements pertained to them. (9th Cir. Opin., p. 3:5-7.)

On June 19, 1984, petitioners filed a

timely petition for a writ of certiorari in this Court.

V

REASONS FOR GRANTING THE WRIT

A. The District Judge and the Court of Appeals Have Decided a Federal Constitutional Question in a Way in Conflict with Applicable Decisions of this Court.

(1) New York Times Co. and its progeny require a balancing of the First Amendment concerns against the individual's interest in reputation.

In a series of decisions beginning with New York Times Co. v. Sullivan, 376 U.S. 256 (1964), this Court has repeatedly held in libel cases that the First Amendment rights of the Press must be balanced against the interests of the defamed individual.

In New York Times Co. itself, this Court held that the protections of the United States Constitution are fully applicable to alleged deprivations of rights via the application of state-created libel law rules that run afoul of the Constitution. On this basis the Court declared unconstitutional an

Alabama libel law scheme that failed to legitimately balance the press' right to publish with the individual's right to protect his reputation. In its historic decision, this Court then fashioned a strict test which acknowledges the important First Amendment rights involved in the balance by requiring that public-figure plaintiffs prove "actual malice" in order to have their case heard on the merits.

To insure proper regard for the First Amendment rights involved, decisions of this Court subsequent to New York Times Co. have made it clear that malice in public-figure cases is not easy to prove, requiring plaintiffs to show that defendants had a "high degree of awareness of probable falsity" (Garrison v. Louisiana, 379 U.S. 64, 74-79 (1964)), and "in fact entertained serious doubts about the truth of his publication". (St. Amant v. Thompson, 390 U.S. 727, 731 (1968).)

It is equally clear, however, that by making it difficult for public-figure plaintiffs to recover in defamation cases, this Court has not intended to obliterate the importance of the individual's interest in reputation, but rather to define a proper constitutional accommodation between rights protected by the First Amendment and the individual's right to the protection of his good name.

Hence, although the rights protected by the First Amendment are fundamental to our system, the right to protection of one's good name "reflects no more than our basic concept of the essential dignity and worth of every human being"; and this Court has approved its "recognition by this Court as a basic of our constitutional system."[4/] (Gertz v. Robert

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4. As indicated in the text, this Court has viewed the constitutional interest in protection of reputation as contained within the protection of "private personality", which "like the protection of life itself, is left primarily to the individual States under (Continued...)

Welch, 418 U.S. 323, 341 [quoting with approval from Rosenblatt v. Baer, 383 U.S. 75, 92 (1960)(Stewart, J., concurring)].)

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4. (Continued) the Ninth and Tenth Amendments." (Gertz, supra, at p. 341.)

To the extent that the Group Libel Rule is itself a creature of the state common law of libel as applied by the federal courts pursuant to the Erie doctrine, it can also be said that action of the California state courts in arbitrarily denying plaintiffs their substantive rights runs afoul of the Fourteenth Amendment as well, which extends the federal guaranty of due process of law to the "judicial" actions of the state courts, when such actions serve to enforce common law rules in violation of the Constitution. As squarely held by this Court in a different but related context: "It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." (Shelley v. Kraemer, 334 U.S. 1, 17 (1947).)

Hence, whether viewed as a limitation upon the federal court itself, or upon doctrines of state law applied in the federal system via Erie, it is firmly established that the individual's interest in reputation is a right recognized and protected by this Court.

Moreover, it is also established that the individual's constitutional right to protection of reputation is no less entitled to protection because it is infringed by state common law provisions applied in the federal courts. As stated in New York Times Co. itself: "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." (New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).)

In its requirement of a balance between the constitutional protections of the First Amendment and those inherent in the individual's right to protection of his reputation, this Court has on recent occasion refused to grant to defendants in libel actions "special" protections beyond those constitutional protections already embodied in the New York Times Co. standard itself. For example, in a decision only last term,

this Court refused to approve the "double-counting" inherent in a California court's scheme that effectively re-introduced the chilling effect rationale of the New York Times Co. standard in determining the issue of jurisdiction. Characterizing this procedure as "double-counting", Justice Rehnquist, speaking for the Court, rejected it and expressly noted that the Court had previously rejected similar attempts to load the constitutional scales by striking a balance that would allow multiple counting of First Amendment concerns over and above the deference already granted these rights via the New York Times Co. rule itself. (Calder v. Jones, ___ U.S. ___, 79 L.Ed.2d 804, 813 (1984)[citing Hutchinson v. Proxmire, 443 U.S. 111, 120, n. 9 (1979), implying that no special First Amendment rules apply for summary judgment].)

In summary, this Court has consistently required that the tension between the First

Amendment right to publish and the individual's interest in reputation be accommodated through the application of a balancing test, and this Court has never interpreted New York Times Co. and its progeny in such a way as to allow for the arbitrary curtailment of the individual's interest in reputation because of First Amendment concerns.

B. The Group Libel Rule Applied by the Lower Court to Deny Petitioners a Hearing on the Merits Is an Arbitrary Rule That Does Not Permit Balancing of the First Amendment Concerns and the Individual's Interest in Reputation.

In adopting the Group Libel Rule, the lower court held that when plaintiffs are members of a "large" libelled group -- generally defined by the court as "any group numbering over 25 members", any plaintiff-members of the group "cannot show that the statements were 'of and concerning them'." (Dist.Ct. Opin., 564 F.Supp. 1151, at 1153.)

On this basis, although acknowledging the constitutional underpinnings of New York Times Co. v. Sullivan (ibid.), the District Court held that the plaintiffs before it, solely by virtue of their membership in a group of 100-125 persons, were necessariy members of a libelled group that was "well above the threshold for showing 'of and concerning'." (Id., at p. 1154.) Once the Court had applied the Group Libel Rule, by the District Court's own admission, plaintiffs in pleading of-and-concerning faced an "insurmountable task". (Id. at p. 1153.) Hence, any criteria suggested by the plaintiffs to narrow the larger group of 100-125 to a subgroup of "ascertainable plaintiffs" were rejected by the District Court and the complaint was dismissed with prejudice.

The Ninth Circuit's memorandum opinion expressly adopted the District Court's application of the Group Libel Rule so as to deny recovery to plaintiffs on the ground

that their 100-to-125-member group was "too large to permit recovery under California law." (9th Cir. Opin., p. 2:15-16.)

As illustrated above, both the District Court and the Ninth Circuit, by adopting the common law rule arbitrarily denying recovery to large groups, effectively denied plaintiffs a trial on the merits of their claim for libel per se, solely because the membership of the libelled group to which plaintiffs admittedly belonged exceeded the numerical limits established under the Group Libel Rule.

Petitioners submit before this Court that the Group Libel Rule is directly at variance with the letter and spirit of the balancing standard consistently required by this Court in New York Times Co. and its progeny. Hence, the Court should grant the instant petition so that the matter can be heard; and, if necessary, return it to the lower court for determination of the of-and-

concerning issue according to the multiple criteria which the lower courts have thus far refused to consider.

C. The Group Libel Rule Threatens Social Interests of Substantial General Importance, and its Existence Is Not Justified by any Rational Public Policy Considerations.

By arbitrarily denying recovery to members of "large groups" (generally defined by the lower court as groups having more than 25 members), the Group Libel Rule insulates even the most scathing and vituperative attacks upon an individual's reputation, provided the attacker has resorted to the device of using a group of more than 25 persons as the immediate object of his defamatory statements. As one commentator has lamented:

> "We are thus confronted with the obvious anomaly that while the law is according implicit recognition to the social ramifications inherent in defamation, it fails com-

> pletely to countenance the reality of the injury and of the damages which may, and do, accrue to an individual by virtue of the permitted impinging upon those groupings and associations which most concretely manifest the individual's contacts with his particular social milieu." (Wilner, The Civil Liability Aspects of Defamation Directed Against a Collectivity, 90 U. of Pa. L.Rev. 414, 415 (1942).)

And, as another scholar ironically observed in a critique of the application of the Group Libel Rule in the United States:

> "Certain groups have used libel and slander on a tremendous scale to achieve their ends and with varying degrees of success. All through history unpopular individuals and minority groups have been made the scapegoats of demagogues and other seekers of power. In recent times the use of this weapon has increased with the growth of mass communication. Defamation has become an integral part of the propaganda effort of many extremist groups.
>
> "It is ironic, indeed, that in the United States, guardian and protector of

> individual rights and champion of justice,...after fighting a global war which was largely the result of group hatreds and defamations, there is no law to combat these same evils." (Brown & Stern, Group Defamation in the U.S.A., 13 Clev.-Marshall L.Rev. 7, 8 (1964).)

In short, petitioners submit that the Group Libel Rule is an archaic and dangerous common law anomaly whose continued existence encourages both racial and social prejudice in the United States by insulating even the most hateful and scurrilous publications from the reach of libel suits so long as they are couched in terms of defamation of a group of more than 25 persons.

Notwithstanding plaintiffs' attempts to have the lower court consider the factual circumstances tending to narrow the larger libelled group of "Hell's Angels wives" to a smaller group of "ascertainable plaintiffs", the district court relied upon the Group Libel Rule to absolutely bar the plaintiffs'

libel claim on the basis of their membership in a "large" group. In explaining its reasons for applying the Group Libel Rule, the district judge maintained that a ban on libel suits by members of large groups was required by "two important pubic policies". (Dist.Ct. Opin., 564 F.Supp. 1151, 1153.) These policies were identified by the court as follows: (1) "Where the group referred to is large, the courts presume that no reasonable reader would take the statements as literally applying to each individual members" (id., at p. 1153); and (2) "...[T]his limitation on liability safeguards freedom of speech by effecting a sound compromise between the conflicting interests involved in libel cases." (Ibid.)

Petitioners contend that neither of the policy grounds suggested by the lower court as the basis for its application of the Group Libel Rule is valid. Petitioners will briefly examine each of the court's

ostensible public policy rationales below:

(1) That individuals are not harmed by group libel.

Virtually all the commentators who have examined the Group Libel Rule in depth are in agreement that individuals may be harmed through group defamation. On the contrary, they maintain, to deny that false accusations levelled against a collection of individuals may cause its members to be shunned, feared, or hated does not comport with the realities of human behavior.[5/] In short, as one legal writer has summarized with regard to the assumption that libel of a relatively

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5. See, e.g., the list of commentators collected in Marcus, Group Defamation and Individual Actions: A New Look at an Old Rule, 71 Calif.L.Rev. 1532, 1537, n. 28 (1983); also see generally Jo Anderson & W. May, McCarthy: The Man, The Senator, The "Ism" (1952)(discussing the extent to which individual careers were adversely affected through accusations against groups with which the individuals had been associated); see also Note, Group Vilification Reconsidered, 89 Yale L.J. 308, 311-13 (1975).

large group of persons cannot cause injury to certain individual members of the group: "...Commentators almost universally agree that the group defamation rule is irrational." (Marcus, supra, 71 Calif.L.Rev. 1532, at p. 1537.)

Furthermore, apart from its lack of support in rational social policy or legal scholarship, the Group Libel Rule usurps the traditional function of the jury by encouraging a trial judge to substitute his own judgment for that of the fact-finder in determining the actual effect of a publication on the average reader.

Finally, barring individual actions because of lack of specific mention of the plaintiff's name in the defamatory publication is legally unnecessary to protect the press against suits by individuals who have suffered no injury, as this Court has held that if the plaintiff cannot demonstrate "actual injury" as a result of the libel,

plaintiff's recovery will be barred in any event. (Gertz v. Robert Welch, supra, 418 U.S. 323, at 349.)

(2) That the Group Libel Rule is necessary to effect a "sound compromise between the conflicting interests involved in libel cases".

Petitioners do not challenge the principle that the lower court must effect an accommodation between the conflicting interests involved in libel cases. Petitioners maintain, however, that a "sound compromise" between First Amendment rights and the individual's interest in reputation has already been established by this Court via the complex and rigorous scheme contemplated by New York Times Co. and its progeny. Because the interests in First Amendment freedoms are already protected by the New York Times rule, petitioners maintain that the lower court may not apply an arbitrary numerical limit to deny plaintiffs

any access to the courts if they are members of large groups, but rather must balance the competing interests involved without reliance upon a rule arbitrarily tipping the scales in favor of the First Amendment concerns and to the exclusion of considerations of the individual's reputational interests.

In summary, the Group Libel Rule is in direct conflict with important social and jurisprudential goals in our society, but it cannot be rationally supported by either of the public policy grounds tendered by the lower court in its support.

D. To Secure Uniformity of Decision in this Important Area of Constitutional Law, this Court Must Require that the Arbitrary Group Libel Rule Be Replaced by a Balancing of the Competing Constitutional Interests Involved in Each Case.

Significant ripples of dissatisfaction with the Group Libel Rule have already begun to appear on the judicial landscape. Hence,

and despite the district court judge's assertion that the courts in California and other states have "consistently held" that plaintiffs cannot show that the statements were of-and-concerning them where the libelled group contains "more than 25 persons" (Dist.Ct. Opin., 564 F.Supp. at 1153), reasoned opinions in at least two of the state courts have rejected the Group Libel Rule in favor of a multi-factor analysis such as that proposed by petitioners below but rejected by the lower courts.

For example, in Fawcett Publications, Inc. v. Morris, 377 P.2d 42 (Okla. 1962), the Oklahoma Supreme Court could find "no substantial reason why size alone should be conclusive" (id., at p. 51), and therefore permitted a suit by a player on a football team of approximately 60-70 members, even though the player was not personally named in the offending publication. The court held that, despite the size of the larger

group to which plaintiff belonged, plaintiff could satisfy the of-and-concerning requirement by resort to a test which focused not only on group size, but upon such other considerations as how easily the plaintiff could be identified with the group at large, how much the notoriety of plaintiff himself made him known to the public as a group member, and how strongly and specifically worded the defamation was.

More recently, a four-judge court in New York also rejected the Group Libel Rule in favor of a multi-factor test such as that advocated and rejected by the lower courts in the instant case. In Brady v. Ottoway Newspapers Inc., 445 N.Y.S.2d 786 (N.Y. App. Div. 1981), the court unanimously denied a motion to dismiss a suit by an unnamed member of a libelled group of "at least 53", and in so doing outrightly rejected the newspaper's contention "that reference to the individual...[member]...

cannot be shown as a matter of law because the group allegedly defamed constitutes an indeterminate class exceeding 25 individuals." (Id., at p. 788.) In a carefully reasoned opinion, the Brady court reviewed the much-maligned history and rationale for the Group Libel Rule and rejected the Rule on the grounds that: (1) an "absolute limit on size is not justifiable"; (2) a "limit on size does not necessarily protect frank discussions on matters of public concern"; and (3) that "size limitations ignore the different characteristics of groups and the varied circumstances of publication which may permit relief for individual injury without interfering with First Amendment guarantees." (Brady v. Ottoway Newspapers Inc., supra, at p. 792.)

As evidenced by the opinions in Fawcett and Brady, the rumblings of judicial discontent with the irrational Group Libel Rule have already created a lack of uniformity

of decision in the lower courts. Hence, a member of a libelled group of more than 25 persons can bring a successful libel suit, for example, in New York; but is absolutely barred from bringing the very same suit in California, even though the same New York Times rule is supposedly invoked to support both contrary results.

Petitioners submit that such a noticeable lack of uniformity poses a real threat to the national standard established by this Court in New York Times Co. and its progeny -- a carefully crafted standard by which the rights of the press and the individual interest in reputation are balanced, regardless of the state in which the libelled plaintiff happens to bring suit.

E. The Multi-Factor Group Libel Standard Advocated by Petitioners Here and in the Lower Court Is Consistent With the Balancing Scheme Mandated by This Court's Previous Decisions, and Will Allow for a

Comprehensive Analysis That Will Preserve The first Amendment Protections Inherent in New York Times Co. v. Sullivan and its Progeny.

Petitioners urge that this Court reject the arbitrary Group Libel Rule and institute in its place a standard whereby an individual member of a defamed group of any size be permitted to maintain a personal defamation action if he can establish that a reasonable person could understand the defamation to apply to the plaintiff through his affiliation with the larger group. In making this preliminary determination of law, the trial court would not be permitted to dismiss plaintiff's libel suit merely because of the size of the libelled group, but would be required to consider multiple factors, including: (1) the size of the group; (2) the degree of specificity of the libellous statements; (3) the degree of public perception of the libelled group as

one containing identifiable group members; (4) the degree to which the individual plaintiffs are associated in the public mind with the larger group; (5) the degree to which the group has an existence independent of the libellous publication itself; and (6) the extent to which geographical and situational peculiarities of the individual plaintiffs are coincidental with specific factual details contained in the libellous publication itself.

By employing a multi-factor analysis such as the foregoing instead of an arbitrary numerical limitation upon suits by members of "large" groups, the various jurisdictions will be able to successfully carry out this Court's requirement that the rights of the press and the individual's interest in reputation be balanced.

Moreover, because plaintiffs would still be required by this Court's libel decisions to show "actual injury", and would

still as public figures be required to show "actual malice" through clear and convincing proof, this Court's rejection of the Group Libel Rule would do nothing to diminish the already formidable and powerful constitutional armorarium available to the press in obtaining the pre-trial dismissal of libel actions that do not meet the rigorous standards required of public-figure libel plaintiffs by this Court. Moreover, because the multi-factor analysis proposed by petitioners would only allow suits in which the plaintiffs were indeed "ascertainable persons" within the larger libelled group, the courts will not be beset by a significant increase in frivolous or meritless suits. Accordingly, the replacement of the arbitrary Group Libel Rule with the multi-factor analysis proposed by petitioners would preserve the necessary constitutional balance between First Amendment rights and the individual's interest in reputation,

without impairing any of the substantial protections already afforded the press against the potential "chilling effect" of private libel actions.

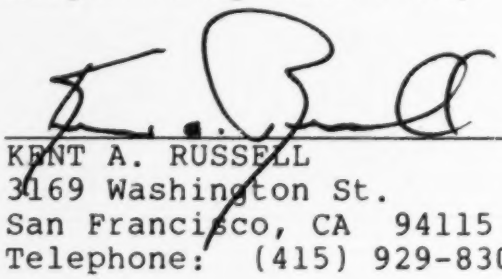
VI

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

DATED: June 18, 1984

Respectfully submitted,



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APPENDIX "A"

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHARON M. BARGER, MARGARET DIANE BRANDES, and VALERIE MARIA GILBERT, Plaintiffs, v. PLAYBOY ENTERPRISES, INC., Defendant.	No. C-82-2198 MHP

MEMORANDUM ORDER AND OPINION

Plaintiffs filed this libel suit against Playboy Magazine on May 12, 1982[1/] based on its publication of an article (attached as Exhibit A to the complaint) entitled "Undercover Angel" and written by Lawrence Linderman. The article purported to describe the experiences of an undercover narcotics agent, Dan Black, who infiltrated the Hell's Angels. Plaintiffs charged in their original complaint that the article

1. Defendant Hugh Hefner was dismissed by stipulation.

"defamed all wives of members of the Oakland and Richmond chapters of the Hell's Angels Motorcycle Club" by its descriptions of alleged sexual activities of "Hell's Angels brides" and "mommas." The article described an "Angel's wedding" at Clear Lake, California as followed the next morning by assorted sexual activities between the bride and Hell's Angels members other than her husband, and stated that Angels beat up their "mommas" unless they agree to perform unusual sexual acts.

On January 10, 1983, this court dismissed the complaint with leave to amend because it contained factual errors on its face and failed adequately to allege that the article referred to plaintiffs personally and was published with actual malice. The court directed plaintiffs to amend the complaint to allege with specificity facts showing the number of Hell's Angels wives and "mommas," wherever located, and the distinction between those groups,

if any. The court further ordered plaintiffs to allege facts showing that defendant published the article with actual malice.

Plaintiffs subsequently filed first and second amended complaints, and defendants have moved to dismiss the second amended complaint for the same defects. Oral argument was heard on March 28, 1983. Having considered the papers submitted and the arguments of counsel, the court now grants defendants' motion to dismiss the complaint without leave to amend.

I. Failure to Plead "Of and Concerning"

Plaintiffs who sue for defamation must show that the allegedly libelous statements were made "of and concerning" them, i.e., referred to them personally. When an article names specific individuals, this is easily done. However, when the statements concern groups, as here, plaintiffs face a more difficult and sometimes insurmountable task. If the group is small and its members

easily ascertainable, plaintiffs may succeed. But where the group is large--in general, any group numbering over twenty-five members--the courts in California and other states have consistently held that plaintiffs cannot show that the statements were "of and concerning them," See, e.g., Noral v. Hearst Publications, Inc., 40 Cal. App.2d 348, 350, 104 P.2d 860 (1940); Mullins v. Brando, 13 Cal.App.3d 409, 422-23& n. 13, 91 Cal.Rptr. 796 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2231, 29 L.Ed.2d 701 (1971), and cases cited therein; Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D. N.Y. 1952). The Noral court, for example, dismissed a complaint for defamation brought by officials of the Workers Alliance based on charges that officials of the group used dues to support Communist activities. Noting that the Alliance had at least 162 officials, the court held that plaintiffs failed to state a claim for libel because "the publication does not defame any ascer-

tainable person....There is nothing in the published article that makes a personal application to the plaintiff." 40 Cal.App. 2d at 350, 104 P.2d 860.

This rule embodies two important public policies. First, where the group referred to is large, the courts presume that no reasonable reader would take the statements as literally applying to each individual member. Neiman-Marcus at 316. Second, and most importantly, this limitation on liability safeguards freedom of speech by effecting

> a sound compromise between the conflicting interests involved in libel cases. On the one hand is the societal interest in free press discussions of matters of general concern, and on the other is the individual interest in reputation. The courts have chosen not to limit freedom of public discussion except to prevent harm occasioned by defamatory statements reasonably susceptible of special application to a given individual.

Service Parking Corp. v. Washington Times Co., 92 F.2d 502, 505-06 (D.C. Cir. 1937) (emphasis added). Indeed, because defamation suits threaten the freedom of speech and of the press protected by the First Amendment, the "of and concerning" requirement may take on constitutional significance. See New York Times v. Sullivan, 376 U.S. 254, 288-92 (1964).

Plaintiffs here allege that they were defamed by the article's statements concerning Hell's Angels "brides" and "mommas." Accordingly, the court must determine whether those terms as used in the article could reasonably refer to groups small enough to meet the "of and concerning" requirement.

Plaintiffs originally contended that the group defamed by the article was "all wives of members of the Oakland and Richmond chapters of the Hell's Angels." Complaint, Paragraph 8. In dismissing the first complaint, the court ruled that no reasonable

reading of the article could support such a geographical limitation on the groups to which it referred. Although the article describes Black's alleged infiltration of the Oakland and Richmond chapters, it presents his observations as illustrative of the conduct of Hell's Angels and their companions generally. For example, the sentence which introduces the section of the article describing Black's experiences with the Angels refers to the character of the national and even international membership of the Hell's Angels: "[b]y all accounts, the Hell's Angels -- with anywhere from 400 to 800 members -- are the most lethal group of motorcycle riders in the United States and probably the world." Exh. A. to complaint at 5. Moreover, the alleged defamatory statements about Hell's Angels brides and mommas follow this broad statement by only a few paragraphs and are not presented as subject to any geographical limitations. The court must interpret the article as it

would appear to the average reader to decide whether it can reasonably bear the meaning ascribed to it by plaintiff. See, e.g., MacLeod v. Tribune Publishing Co., 52 Cal.2d 536, 550 (1959); Mullins v. Thieriot, 19 Cal.App.3d 302, 304 (1971). Read in the context of the article as a whole, the alleged defamatory statements plainly refer to the women who associate with the Hell's Angels throughout the United States, if not the world.

Because the first complaint revealed on its face inconsistencies with the article attached to it as an exhibit, and because this lawsuit touches on the sensitive area of freedom of speech and of the press, the court ordered plaintiffs to plead the number of members in the groups allegedly defamed. The Ninth Circuit has held that where plaintiff challenges

> conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the

> exercise of First Amendment rights requires more specific allegations than would otherwise be required.

Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076, 1082-83 (9th Cir. 1976). Williams v. Gorton, 529 F.2d 668, 671-72 (9th Cir. 1976), aff'd without opinion, 566 F.2d 1186 (1977), is contra. However, Williams preceded Franchise, and the court concludes that Franchise is better reasoned.

In their second amended complaint, plaintiffs have made a valiant attempt to discover in the unchanged text of the article a new and narrower definition of the group defamed in order to satisfy the "of and concerning" requirement. Abandoning their prior interpretation of the article as defaming Hell's Angels wives by its statements about brides, plaintiffs now contend that not all wives are or ever have been "Hell's Angels brides." Thus, although they

admit that wives number approximately 100 to 125 nationwide -- well above the threshold for showing "of and concerning" -- they claim that "brides" number only about 15 to 20. This alchemy is accomplished by plaintiffs' imaginative interpretation of the term "Hell's Angels bride" as "those females who were married to Hell's Angels members at a wedding ceremony followed by a wedding party of some sort, attended by at least some members of the Hell's Angels Motorcycle Club."

Plaintiffs confess that this reading of "bride" did not occur to them during their scrutiny of the article in preparation of the original complaint and opposition to defendant's first motion to dismiss. At that time, they repeatedly charged that the article defamed "Hell's Angels wives." Only after the court indicated that plaintiffs faced a serious problem in satisfying the "of and concerning" requirement and probed for more careful definitions of

terms such as "momma" did plaintif's attorney and his clients arrive at this new interpretation.

Plaintiff's cannot, however, plead libel by imputing an esoteric meaning to the term "bride" which has no reasonable basis in the article and is inaccessible to the ordinary reader. Under California libel law,

> a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction. That is to say, the publication is to be measured not so much by its effect when subjected to critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader ....[H]air splitting analysis of language has no place in the law of defamation, dealing as it does with the impact of communication between ordinary human beings.

MacLeod v. Tribune Publishing Co., 52 Cal.

2d 536, 547, 550 (1959)(emphasis added). See also Mullins v. Thieriot, 19 Cal.App.3d 302, 304 (1971). Accordingly, the court must interpret the term "bride" in the article as it would be understood by the ordinary reader.

The ordinary meaning of "bride" is virtually synonymous with wife: "a woman newly married or about to be married."[2/] Websters Third New International Dictionary (1976). Nowhere does the article state or imply that it uses "bride" to mean anything different than a woman newly married to a member of the Hell's Angels. Even if the term "bride" bears a unique meaning in the Hell's Angels' lexicon, that meaning is not accessible to the uninitiated reader of the

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2. Indeed, to the degree that there is a relevant difference between "brides" and "wives," the former encompasses a larger group because it may include some who were "about to be married" but in fact never did marry, whereas all wives by definition were once brides. "Brides" would also include former wives, while "wives" might not.

article. Indeed, it was not initially accessible to plaintiffs. Thus, the article is not "reasonably susceptible," Service Parking Corp., 92 F.2d at 506, to the interpretation which plaintiffs attempt to ascribe to it.[3/] The court declines plaintiffs' belated invitation to torture the ordinary meaning of the article to arrive at a definition which no reasonable jury could accept.

Finally, it should be noted that plaintiffs' method of redefining the group libelled, if accepted, would seriously undermine the "of and concerning" limitation on liability. It is as if plaintiffs

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3. That the court in alerting plaintiffs to the need to plead the size of the groups allegedly defamed may have probed more deeply than the layperson unskilled in legal technicalities would have does not change the rule that in defamation suits the court must interpret publications as they would be understood by the ordinary reader. Moreover, the court's order required plaintiffs to make more specific allegations regarding "wives," not brides.

in the Noral case, 40 Cal.App.2d 348, had claimed that the group libelled was not all "officials of the Workers Alliance," who were accused by the defendant newspaper of diverting dues to Communist activities, but only those amond the Alliance officials who aided Communists, who they claimed numbered but a handful. Yet the article spoke in general terms, and it is such generalities which are not actionable.

The only other group plaintiffs claim has been defamed by the article is "Hell's Angels mommas," which plaintiffs define as women involved in extra-marital sexual relationships with Hell's Angels members. Plaintiffs admit that this group numbers "at least 500" nationwide. Thus, it is far too numerous to show "of and concerning." Moreover, since "brides" and "mommas" as defined in the complaint are mutually exclusive groups, and plaintiffs claim to belong to the former group only, plaintiffs have not pleaded that the statements about

mommas refer to them at all.

This is the second amended complaint. Plaintiffs have been on notice since the first motion to dismiss that they must adequately plead "of and concerning." They have failed to do so. This is not a failure which additional time or amendments can cure. In view of the burden on defendant's exercise of its First Amendment rights which would be imposed by unnecessarily prolonging this litigation, the complaint is dismissed with prejudice for failure to state a claim.

II. Inadequate Allegations of Malice

Defendants also moved to dismiss the complaint on the ground that plaintiffs failed adequately to plead malice as defined by the Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny. New York Times required plaintiffs who are public officials to prove malice in the sense of publication of false statements with knowing or reckless disregard for the

truth. Subsequent Supreme Court cases have made it clear that malice is very difficult to prove, requiring plaintiffs to show that defendant had "a high degree of awareness of probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74-79, 85 S.Ct. 209, 216 (1964), and "in fact entertained serious doubts as to the truth of his publication," St. Amant v. Thompson, 390 U.S. 727, 731 (1968), such that defendant had a "subjective awareness of probable falsity." Gertz v. Robert Welch, Inc., 418 U.S. 323, 335 n. 6 (1974). The Supreme Court has extended this requirement to public figures, see Gertz v. Robert Welch, Inc., 418 U.S. at 335-36, and plaintiffs have admitted that they are public figures for purposes of this lawsuit. Although this court dismisses the complaint for failure to plead "of and concerning," it is appropriate to rule on the malice issue because of the important First Amendment interests implicated in this lawsuit.

The original complaint contained only broad, conclusory allegations of malice, such as that defendant acted "wantonly," "recklessly" and "with constructive knowledge" of the falsity of the article. The court required plaintiffs to plead malice with greater specificity because of the errors apparent on the face of the complaint and because of the potential chilling effect of a baseless defamation suit on the exercise of defendant's First Amendment rights. Franchise Realty, 542 F.2d at 1082-83; cf. Lewis v. Time, Inc., 83 F.R.D. 455 (E.D. Cal. 1979).

Although plaintiffs amplified their allegations of malice in the second amended complaint, they remain insufficient. Plaintiffs allege primarily that defendant failed to investigate the statements about Hell's Angels brides and mommas. Failure to investigate does not by itself constitute recklessness. St. Amant v. Thompson, 390 U.S. at 731-33 (1968), citing New York

Times, 376 U.S. at 287-88. The Supreme Court expressly recognized that its adoption of a subjective standard for malice may tend to discourage investigation by placing "a premium on ignorance." St. Amant at 731-32. It decided, however, that this is not too high a price to pay for the added protection provided to First Amendment freedoms by a subjective rather than an objective standard.

Plaintiffs argue that defendant had a higher duty to investigate here because the article was not "hot news." The plurality opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 157 (1967), considered the need for quick publication to be a relevant factor, and several courts have followed its lead. See Carson v. Allied News Co., 529 F.2d 206, 211 n. 12 (7th Cir. 1976); Vandenburg v. Newsweek, Inc. 507 F.2d 1024, 1026 (5th Cir. 1975); Goldwater v. Ginzburg, 414 F.2d 325, 339 (2d Cir. 1969). Under Butt's gross negligence type of standard,

388 U.S. at 158 ("highly unreasonable conduct"), this was a relevant factor in assessing the publisher's objective duty of care. However, the plurality opinion in Butts was superseded by the majority opinion in St. Amant, which adopted the stricter subjective awareness of probable falsity standard. 390 U.S. at 731. St. Amant did not specifically disapprove the "hot" and "cold" news distinction of Butts. However, under its subjective standard, the distinction between "hot" and "cold" news loses its significance because the test is no longer what a reasonable publisher should have known, but rather whether the publisher actually knew or entertained serious doubts that the statements were false.

Ironically, plaintiffs charge that facts about the article's source revealed in the article itself should have led Playboy to entertain serious doubts about its probable falsity. Plaintiffs claim

that the article shows that Black took the drug "speed," committed armed bank robberies, lied and was mentally unstable. Plaintiffs ask the court to assume these parts of the article were true in order to show that the parts they object to were published with knowledge of probable falsity. The parts of the article they would rely upon, however, must not be torn out of context. The article chronicles the stress and guilt engendered by Black's dangerous assignment as a highly effective undercover narcotics policeman, which forced him to adopt the lifestyle of the Hell's Angels and drug users and then to betray his new companions to the authorities. The article portrays the break-up of Black's marriage, his drug use and subsequent robberies as a product of this tension and his desire to be punished. It does not depict him as a liar, except insofar as it describes his efforts to preserve his "cover." On the contrary, the article

describes him as an outstanding narcotics agent whose testimony before a grand jury led to twenty-eight arrests, with twenty-five resulting convictions.

For these reasons, Black's character as revealed in the article was not sufficient to put defendant on notice of probable falsity. At the same time, the publisher responsibly did not conceal from its readers the factors about Black which might affect his credibility. Instead, it enabled its readers to exercise their own judgment. It would be unfortunate indeed if such disclosures laid publishers open to increased liability. The potential chilling effect is obvious.

In addition, it should be noted that even if the publisher relied solely on Black, use of a single source does not establish recklessness. New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966). If the law were otherwise, readers would be deprived of publications about

obscure or dangerous subjects for which it is difficult to obtain even one source. The article challenged here may involve just such a subject.

Plaintiffs make only two allegations which go beyond failure to investigate. First, they charge that defendant knew that the United States Attorney "failed to confirm" Black's infiltration of the Hell's Angels. The phrase "failure to confirm" is meaningless. Second, plaintiffs charge that defendants learned that Mary Jo Peterson, described in the article as Black's close companion, was not dead as stated in the original draft of the article. However, the article as published does not claim that she died. Therefore, plaintiffs have established at most that defendant corrected the error when it was discovered. The law does not require that such responsible behavior be punished by greater exposure to liability.

Thus, even if all of plaintiffs' alle-

gations (other than those specifically in conflict with the article itself) are assumed to be true, they fail to show that defendant acted with "malice." The danger that suits based on such flimsy allegations of malice would pose to freedom of speech and of the press if allowed to proceed is only too clear. As Judge Skelly Wright has observed, the cost of defending even truthful publications is so great that "[u]nless persons, including newspapers, desiring to exercise their first Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors." Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966).

IT IS HEREBY ORDERED THAT Defendant's Motion to Dismiss is granted without leave to amend.

DATED: May 5, 1983

APPENDIX "B"

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHARON M. BARGER, MARGARET DIANE BRANDES, and VALERIE MARIA GILBERT,	)	No. 83-2040
Plaintiffs-Appellants,	)	DC No. CV 82-2198 MHP
vs.	)	
PLAYBOY ENTERPRISES, INC.,	)	MEMORANDUM*
Defendant-Appellee.	)	

Appeal from the United States District Court for the Northern District of California, Marilyn H. Patel, District Judge, Presiding

Argued and submitted January 13, 1984

Before: DUNIWAY, SKOPIL, and FERGUSON, Circuit Judges

Barger, Brandes, and Gilbert brought a diversity action against Playboy Enterprises, Inc. for libel. The district court granted defendant's motion to dismiss plaintiffs' amended complaint for failure

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* Per Ninth Circuit Rule 21, this disposition is not intended for publication and shall not be cited as precedent.

to state a claim. Barger v. Playboy Enterprises, Inc., 564 F.Supp. 1151 (N.D. Cal. 1983). We affirm.

Libel claimants must allege that defamatory statements refer to them personally. Noral v. Hearst Publications, 40 Cal.App.2d 348, 350, 104 P.2d 860, 862 (1940). The publication must defame an ascertainable person and apply with certainty to the plaintiff. Id. "[W]here a large group is libeled, individual members of that group do not have a cause of action based merely on membership." Mullins v. Brando, 13 Cal.App.3d 409, 419, 91 Cal. Rptr. 796, 802 (1970), cert. denied, 403 U.S. 923 (1971). However, the members of a large group may show that libelous statements refer to them if they can show they are part of an identifiable and relatively small subgroup. Mullins, 13 Cal.App.3d at 432 n. 13, 91 Cal.Rptr. at 805 n. 13.

Plaintiffs, all wives of Hell's Angels members, originally alleged they were

defamed as "wives" by an article purporting to describe as commonplace unusual sexual activities occurring after a Hell's Angels' wedding. The district court found that the allegedly defamatory statements referred to all women associating with Hell's Angels, a group too large to permit recovery under California law. Barger, 564 F.Supp. at 1154. Plaintiffs then amended their complaint, narrowing the group allegedly libeled to Hell's Angels' "bride[s]," defined as a subgroup of the larger group of "wives." Hell's Angels' "brides," according to the amended complaint, are women who marry Hell's Angels at weddings followed by celebrations attended by other Hell's Angels.

Libelous statements are to be interpreted according to the natural meaning given them by the average reader. MacLeod v. Tribune Publishing Co., 52 Cal.2d 536, 547, 343 P.2d 36, 41-42 (1959). We agree with the district court that the term

"bride" as used in the article would be understood by the average reader to be "virtually synonymous with wife." 564 F.Supp. at 1155. The district court properly concluded that the article was not reasonably susceptible to the plaintiffs' strained interpretation and correctly held that plaintiffs had failed to allege that any defamatory statements pertained to them. Id.

Because we affirm the district court's dismissal of the complaint on these grounds we need not reach the adequacy of the malice allegations.

AFFIRMED.

APPENDIX "C"

APPENDIX "C"

(1) District Court Formulation of Group Libel Rule

> "Plaintiffs who sue for defamation must show that the allegedly libelous statements were made 'of and concerning' them, i.e., referred to them personally. When an article names specific individuals, this is easily done. However, when the statements concern groups, as here, plaintiffs face a more difficult and sometimes insurmountable task. If the group is small and its members easily ascertainable, plaintiffs may succeed. But where the group is large -- in general, any group numbering over twenty-five members -- the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning them'." (Barger v. Playboy Enterprises, Inc., 564 F.Supp. 1151, 1153 (1983).)

(2) U.S. Constitution, Amendment 1

"Religious and political freedom.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(3) U.S. Constitution, Amendment 9

"Rights retained by people.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(4) U.S. Constitution, Amendment 10

"Powers reserved to states or people.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to to the States respectively, or to the people."

APPENDIX "D"

APPENDIX "D"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHARON M. BARGER, et al., Plaintiffs, vs. "PLAYBOY", et al., Defendants.	No. C-82-2198-MHP

ORDER OF DISMISSAL [Fed.R.Civ.P. 12(b)(6)]; ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [Fed.R.Civ.P. 56]

The Motion of Defendant Playboy to Dismiss the Complaint on file herein came on regularly for hearing on December 21, 1982 before the Honorable Marilyn H. Patel, Judge, United States District Court for the Northern District of California. Both parties having been represented by counsel and the matter having been duly briefed and argued,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The amended complaint be dismissed

without prejudice for failure to state a claim upon which relief may be granted.

2. Plaintiffs shall have until January 10, 1983 to amend. Any such amendment to the complaint must allege with specificity the following:

(a) Facts showing that Defendant acted with actual malice for the rights of Plaintiffs, and

(b) That the statements alleged by Defendants to be libelous are of and concerning Plaintiffs. In particular, such allegations must include;

(i) The number of wives of Hells Angels in all chapters of that motorcycle club wherever located;

(ii) The number of Hells Angels "mamas" connected with all chapters of the club wherever located;

(iii) The distinction, if any, between "brides" and "mamas."

3. Plaintiff's Motion for Summary Judgment is denied. Plaintiffs' Motion for partial summary judgment pursuant to Fed.R. Civ.P. 56(d) is also denied.

4. Defendants shall have twenty days to respond to any amended complaint filed by Plaintiffs.

5. Discovery is stayed until the complaint is amended and an answer is filed.

Dated at San Francisco, California, this 10th day of December, 1982.

No. 84-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SHARON M. BARGER, MARGARET DIANE BRANDES and VALERIE MARIA GILBERT,
Petitioners,

v.

PLAYBOY ENTERPRISES, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether there is a constitutional right to reputation that the states must protect by the adoption of a uniform rule regarding the substantive law of group libel.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Playboy Enterprises, Inc. respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Ninth Circuit's unpublished opinion in this case.

INTRODUCTION

Petitioners brought this diversity action for defamation in connection with an article published in the July, 1981 issue of Playboy Magazine, entitled "Undercover Angel." The allegedly defamatory matter in the article did not identify or refer to petitioners specifically but simply referred to a group in which petitioners claim membership, i.e., the "brides" of the Hell's Angels Motorcycle Club.

Petitioners' Second Amended Complaint alleged that, although the article referred only to a group, readers understood it as referring personally to petitioners. The Complaint further stated that the group of "Hell's Angels' brides" consisted of at least 125 persons. Petitioners alleged nonetheless that the purportedly defamatory matter was "of and concerning" them.

The District Court dismissed the complaint, applying California law: "Where the group is large—in general, any group numbering over 25 members—the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning them,' [citations]." Appendix "A" to Petition for Writ of Certiorari (the "Petition") at 4.

In an unpublished per curiam decision, the Ninth Circuit Court of Appeals affirmed the dismissal, relying on the same California rule of law: "The publication must defame an ascertainable person and apply with certainty to the plaintiff. . . . Where a large group is libeled, individual members of that group do not have a cause of action based merely on membership." Appendix "B" to Petition at 2.

THE WRIT SHOULD BE DENIED

I. The Petition Does Not Raise Any Issues Of Constitutional Dimension, But Merely Seeks To Change A Common Law Rule Adopted By California.

The sole question that petitioners present to this Court is

> . . . whether the Group Libel Rule denied Petitioners their constitutional rights by arbitrarily denying them the right to recover damages . . . solely because petitioners were members of a 'large' group including more than 25 persons. Petition at i.

Petitioners assume in their question, but do not—and cannot—demonstrate in their Petition, that there exists any constitutional right to a cause of action for defamation.[1] Petitioners assert that this "right" to reputation finds its source in the 9th, 10th and 14th Amendments to the Constitution: "[T]he several states are required to protect the competing constitutional nterests involved in the protection of the individual's reputation." Petition at 2-3, 16-17 n.4.

Contrary to petitioners' unfounded assertions, this Court has plainly held that there is no constitutional right to reputation. In *Paul* v. *Davis*, 424 U.S. 645 (1976), this Court rejected any notion that the interest in reputation asserted in a libel action is either property or liberty protected by the Fourteenth Amendment, or is otherwise constitutionally protected. *Id.* at 712. Accordingly,

> [The] interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even whereas here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest and reputation asserted in this case is neither "liberty" nor "property" guaranteed against State deprivation without due process of law. *Id.* at 712.

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[1] Indeed, petitioners go so far as to argue that the Constitution mandates that the states must uniformly implement this heretofore unrecognized constitutional "right". Petition at 30-38. This issue is discussed in Section II, *infra*.

Two years earlier, in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court explained that because libel law is chiefly a creature of state law, the states have wide latitude in developing legal principles to protect the interest in reputation. The only limitation on the states' power to enforce the law of libel is, of course, that imposed by the First Amendment. *Id.* at 341-46. Thus, "[T]he protection of private personality, like the protection of life itself, is left primarily to the individual states under the 9th and 10th Amendments." *Id.* at 341.

Because there exists no constitutional right to the protection of reputation, the state of California has substantial latitude in providing and implementing a remedy for those defamed. Petitioners do not claim that the District Court or the Court of Appeals incorrectly applied California law as interpreted by the highest court of that state. What petitioners do claim is that the "Group Libel Rule" is "arbitrary" and "is not justified by any rational public policy considerations." Petition at 20, 23. It follows that the only question truly raised by the Petition is whether the rules California has adopted for the protection of the reputation of its citizens is a wise one. Absent some constitutional limitation, however, the wisdom of a state law is not a matter with which this Court is concerned. The Petition should be denied.

II. There Is No Conflict Among The Circuits Regarding The Group Libel Rule.

Petitioners suggest that the Petition should be granted in order "to secure uniformity of decision in this important area of constitutional law. . . ." Petition at 30-34. A reading of this portion of the Petition reveals, however, that there is simply a conflict among state courts in determining which group libel doctrine to adopt.

As this Court stated in *Ruhlin* v. *New York Life Insurance Company*, 304 U.S. 202 (1938), "as to questions controlled by state law . . . , conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Id.* at 206. That Oklahoma and New York have adopted group libel rules more to petitioners' liking than the rule in California, is not a basis for this Court to exercise its jurisdiction.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: August ____, 1984

NO. 84-34

IN THE

SUPREME COURT OF THE UNITED STATES

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On Petition For A Writ Of Certiorari
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For The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "Group Libel Rule" denied petitioners their constitutional rights by arbitrarily denying them the right to recover damages for libel per se, solely beause petitioners were members of a "large" group including more than 25 persons.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NO. 84-34

SHARON M. BARGER, MARGARET DIANE BRANDES and VALERIE MARIA GILBERT,

Petitioners,

v.

PLAYBOY ENTERPRISES, INC.,

Respondent.

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On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that this Court grant the petition for a writ of certiorari, seeking review of the Ninth Circuit's unpublished opinion in this case.

THE WRIT SHOULD BE GRANTED

I. The Individual's Right To Reputation Is Entitled To The Constitutional Protection Afforded By The Balancing Test Of New York Times And Its Progeny.

The sole argument advanced by respondent in opposition to petitioners' application for a writ of certiorari is that the individual's interest in reputation is allegedly devoid of any constitutional protection. This argument is grounded upon respondent's view that in Paul v. Davis, 424 U.S. 645 (1976), this Court "rejected any notion that the interest in reputation asserted in a libel action is either property or liberty protected by the Fourteenth Amendment, or is otherwise constitutionally protected." (Respondent's Brief in Opposition, p. 3.)

Petitioners certainly do not challenge this Court's holding in Paul, precluding Civil Rights actions based

upon reputational stigma alone; however, petitioners strenuously dispute respondent's contention that the individual's interest in reputation has been relegated to the constitutional graveyard by Paul v. Davis or by any other decision of this Court.

In Gertz v. Robert Welch, 418 U.S. 323 (1974), this Court expressly declined the opportunity to provide absolute protection to the press by refusing to grant the news media an "unconditional and indefeasible immunity from liability for defamation." (Gertz, supra, at p. 341.) On the contrary, applying the balancing scheme of New York Times v. Sullivan, 376 U.S. 256 (1964), this Court spurned claims that news media's need to avoid self-censorship was the "only societal value at issue" (id., at 341) and specifically rejected any absolute protection

of libel by the communications media. In so holding, the Court clearly expressed its opposition to any absolute media protection that would "requir[e] a total sacrifice of the competing values served by the law of defamation". (Ibid.)

Consequently, rather than defining the individual interest in reputation into constitutional obscurity, this Court in Gertz took the opportunity to approve Justice Stewart's view that: "The individual's right to protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.'" (Gertz, supra, at p. 341.) Indeed, in language particularly pertinent to the instant case, the Gertz court noted:

> "The protection of private personality, like the protection

> of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system. (Ibid.; emphasis added.)

Respondent purports to rely on Gertz, and indeed acknowledges that the states' power to enforce the law of libel is limited by the First Amendment (Respondent's Brief in Opposition, p. 4); however, ignoring the language quoted immediately above, respondent maintains that this Court's decision in Paul v. Davis served to obliterate any constitutional recognition of the interest in reputation from any source. (See underscored portion of quotation from Respondent's Brief in Opposition, p. 3, quoted at the end of the first paragraph, supra.)

Petitioners maintain that such a reading of Paul is far beyond anything

contemplated by that decision.

Initially, petitioners must point out the obvious: that Paul was not a libel case and did not in any sense involve a balancing of constitutional interests under the New York Times test; but rather was a case concerned solely with the issue of "whether [petitioner's] defamation of [respondent], standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment." (id., at p. 694.) Accordingly, throughout its opinion in Paul, this Court focused its analysis upon the scope of protection afforded the interest in reputation by the Fourteenth Amendment, and by corollary to the flood of Civil Rights actions that would no doubt have arisen if this Court had approved the claim urged by the Paul petitioner.

Nowhere, however, does the Paul opinion speak to the balancing test of New York Times, the scope of the First Amendment's effect upon the law of group libel, or to the competing interests involved in striking a constitutional balance between the rights of the communications media and the rights of the individual whose reputation has been bludgeoned by libel per se.

In short, while Paul v. Davis does hold that the due process clause does not "incorporate" the interest in reputation as a fundamental right thereunder, it surely does not serve to extinguish the constitutional protection already afforded this interest independently of the Fourteenth Amendment, via the balancing principles carefully crafted by this Court in New York Times and its progeny.[1/]

1/ Contrary to respondent's assertions, in their petition for certiorari, (Continued...)

Indeed, it is ironic that respondent, having argued strenuously in the lower courts that the Group Libel Rule is "a

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1/ (Continued) petitioners did not claim that the constitutional protection for the individual's interest in reputation "finds its source in the Ninth, Tenth, and Fourteenth Amendments to the Constitution." (Respondent's Brief in Opposition, p. 3.) Rather, petitioners relied throughout upon the holdings of New York Times and Gertz, which require a balancing of the interests protected by the First, Ninth, and Tenth Amendments. In a footnote to their argument, petitioners did allude to the possibility that Fourteenth Amendment rights could be violated by certain kinds of state action that serves to deny due process of law by infringing upon the ability of plaintiffs to bring libel suits to the jury -- a question not necessarily answered by this Court's decisions in Civil Rights cases such as Paul v. Davis, supra. However, the central argument advanced throughout the body of the petition for certiorari is that the constitutional protection for the rights here asserted by petitioners flows not from the due process clause of the Fourteenth Amendment, but rather from the constitutional recognition of these rights inherent in applying the balancing test mandated by New York Times/Gertz. (See, e.g., § VI (A)(1) of the petition; see also Appendix "C" to the petition for certiorari, which sets forth only the First, Ninth and Tenth Amendments (and not the Fourteenth) as the constitutional provisions centrally involved in the instant case.)

matter of constitutional law" (See, e.g., Appellee's Responding Brief in the Ninth Circuit Court of Appeals, p. 8, first full paragraph), would now suggest for the first time that the issues here involved are merely state law matters having no constitutional significance. On the contrary, petitioners maintain that the balancing principles contemplated by the New York Times rule cannot be so one-sided as to allow the media to shield libelous statements in the lower courts by constructing an argument with a constitutional foundation, only to abandon that foundation at the Supreme Court level by arguing that the Constitution has nothing at all to do with the case.

In summary, while the holding of Paul v. Davis does preclude the due process clause as a constitutional wellspring of a Civil Rights' action based solely upon

stigma to one's reputation, that holding does not obliterate the constitutional protection afforded the individual interest in reputation by virtue of the balancing of constitutional interests inherent in the New York Times test and exemplified by the Gertz language heretofore discussed.[2/]

2/ A survey of the many circuit cases discussing the reach of Paul v. Davis reveals that they are virtually all Civil Rights actions involving the scope of the rights of the individual against actions by governmental agents and employees, and that none of them are libel cases governed by the constitutional balancing principles involved in New York Times and its progeny. (See, e.g., Mitchell v. King, 537 F.2d 393 (C.A. 10 1976) [revocation of appointment to regent does not, under Paul, deprive public official of due process]; Coliazzi v. Walker, 542 F.2d 969 (C.A. 7 1976) [Paul interpreted to hold that stigma to reputation plus discharge or failure to retire may give rise to Civil Rights claim]; Huntley v. Comm. School Bd. of Brooklyn, 543 F.2d 979 (C.A. 2 1976) [some defamations may give rise to valid due process claim where coupled with other factors not present in Paul]; Bellows v. Dainack, 555 F.2d 1105 (C.A. 2 1977) [holding that Paul does not preclude Civil Rights action based upon illegal arrest with excessive force];
(Continued...)

II. There Is A True Conflict Between The Lower Federal Courts In Interpreting The Effect Of The New York Times Standard Upon The Construction And Application Of The Group Libel Rule, Thus Creating A Lack Of Constitutional Conformity.

Respondent argues that the diverse formulations of the Group Libel Rule are

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2/ (Continued) Bonner v. Coughlin, 545 F.2d 565 (C.A. 7 1976) [Paul interpreted as precluding plaintiff from "federalizing" tort actions against government employees]; Ventetuolo v. Burke, 596 F.2d 476 (C.A. 1 1976) [Paul interpreted as holding that a defamation claim alone is insufficient to establish Civil Rights action absent a termination of employment; Dennis v. S & S Consolidated Rural H.S., 577 F.2d 338 (C.A. 5 1978) [Paul explained as holding that defamation charge alone does not state § 1983 claim for relief, absent other governmental action with respect to plaintiff]; Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (C.A. 9 1981) [Paul interpreted to preclude Civil Rights action based solely on allegations by athlete of tongue-lashings by coach at state university].

nothing more than conflicts between the state courts over which common-law tort rule to apply, a matter admittedly beyond the jurisdiction of this Court. Yet this argument misses the point: that the formulation of the Group Libel Rule, when influenced by the local district court's interpretation of the New York Times standard, clearly does invade the realm of federal constitutional law. This is precisely what has occurred in the instant case, where respondent argued that the so-called Group Libel Rule was mandated by New York Times, and the District Court in adopting its formulation of the Group Libel Rule, expressly alluded to the "constitutional significance" of the balancing principles mandated by New York Times v. Sullivan. (See Dist.Ct. Opin., p. 1153.)[3/]

3/ Moreover, when petitioners advocated that the District Court and Ninth (Continued...)

Hence, this Court is not here presented with -- as respondent suggests -- a mere squabbling among the state ourts over which common-law tort rule to apply; but rather with a demonstrable lack of uniformity in the federal courts regarding the very nature and effect of the New York Times standard upon the formulation of the Group Libel Rule. It is this constitutional uncertainty which petitioners urge this Court to put to rest by announcing a uniform rule of constitutional interpretation. Thus, this case presents a wholly valid basis for the exercise of its jurisdiction.

3/ (Continued) Circuit should adopt Oklahoma's multi-factor approach to the Group Libel Rule, respondent argued that "adoption of the Fawcett test would return libel law to the pre-New York Times dark ages." (Appellee's brief before the Ninth Circuit, p. 13, third full paragraph.)

CONCLUSION

Respondent does not challenge any of the important legal rules and social policies set forth at length in the petition for hearing. Rather, having prevailed upon the lower courts to formulate a Group Libel Rule on the basis of the constitutional principles emanating from New York Times, respondent now argues that this case does not involve any balaning of rights of constitutional significance. As discussed here and in the petition itself, the rights of petitioners to a fair and uniform application of the New York Times standard are indeed interests of constitutional significance. Hence, and for all the reasons advanced by petitioners, this Court should grant the instant petition and address itself

to the important constitutional questions presented.

Respectfully submitted,

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